No. 3807

IN THE 2

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY

FREDERICK H. GREIME,
Libelant and Appellant,

vs.

Steam Vessel "DAISY", etc.,
S. S. "FREEMAN",
Claimant and Appellee.

BRIEF FOR APPELLEE.

FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE,
Proctors for Appellee.

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BRIEF FOR APPELLEE.

Statement of Facts.

The accident occurred in April, 1920,* on board the steam schooner "Daisy". The vessel was taking aboard a cargo of lumber at Knappton, Washington. Appellant was working in the hold. The owners and operators were residents of San Francisco and were not with the ship at the time of the accident. The schooner was under the exclusive control of her officers. Stevedores in the

* So that section 33 of the Merchant Marine Act of 1920 effective June 5, 1920 (41 Stat. L. 1007) and purporting to create a liability in damages against shipowners for injuries sustained by negligence as distinguished from those resulting from unseaworthiness or defective equipment, is inapplicable.

employ of the ship, under the sole direction of the mate, assisted in the loading.

The equipment of the vessel may be described as follows: The booms—two 56-foot round timbers—were footed to the ship's mast near its base: the upper end of one (called the inshore boom) extended over the dock, and that of the other (called the offshore boom) was plumbed over the ship's offshore rail. Near the base of the mast was the winch. This, on the "Daisy" was of the friction type. It consisted of the driving cog wheel cast upon the middle point of a shaft, with a spool on either side, riding loosely on the same shaft; the friction, made of wood, cut in the shape of a truncated cone—secured fast to the sides of the cog wheel with the smaller end pointed towards the near spool; and levers to throw the spools in against the friction. The cogwheel was geared directly to a steam-driven shaft. On pressing the steam foot pedal, the wheel and the friction cone revolved, but the spools revolved only when in against the friction. Each spool was operated by its own lever. Around one was wound the wire cable known as the offshore fall and around the other that called the inshore fall. Each fall ran from its spool through pulley blocks along and to the upper end of the corresponding boom, thence to the common cargo hook to which it was fastened. The cogwheel and friction always turned together in the same direction. The spools (hereafter referred to as the drums) turned either direction. When a load was to be lifted, the drum to be used was thrown against the friction and revolved with it and as the drum revolved, the respective fall was wound around it.

When a load was to be lowered, the drum was thrown off friction and turned the opposite direction by the weight of the load—the fall in this instance "paying off" from the drum. It follows that one or each drum might be unwinding its fall while, at the same time, the cogwheel and friction might be turning directly opposite.

When the vessel moored at the lumber company's dock, the lumber to be taken was made up in several piles, some close to the edge of the dock and others at various distances further back. In loading, the lumber was first taken from the piles nearest the ship and when this had been removed, the next were taken and so on until a full cargo had been obtained. In the course of the work it was found that some of the piles furthest back from the ship were too far away to be picked up with the ends of the falls connected. To meet this condition, the falls were separated at the cargo hook (that is to say, at the chain contrivance holding the cargo hook, which is spoken of as "The Blacksmith Shop" or "bridle") and while the end of the fall leading from the offshore boom was held by a stevedore on the dock, the end of the fall leading from the inshore boom was taken up the dock to the load. The load was then dragged over the dock with the inshore fall and when brought to the proper distance from the ship, the two falls were again connected and the load was taken aboard as originally when the lumber was close by.

The testimony is that when, in practice, the inshore fall is being used separately as above described, the

manner of tending the end of the offshore fall has been various, according to the circumstances or to the whim of the mate who happens to be in charge. If a pile is convenient, a rope strap is thrown around it and the end of the fall is hooked into it, or a heavy spike is driven into the dock or as here a stevedore takes hold of the hook. Captain Evanson said on this subject (Ap. 54):

> "A spike or ring bolt or anything you want to, and tie your strap in on some lumber pile; there are several things that can be done.
>
> Q. That is up to the Captain? A. Yes.
>
> Q. It would be perfectly safe if he had a strap hooked on there, would it? A. Yes."

The accident occurred while a load was being hauled over to the ship's side with the inshore fall. Due either to the thoughtlessness of the winchman in throwing into friction the drum to which the offshore fall was attached, or to the inattentiveness of the stevedore holding the end of the offshore fall, it (the end of the offshore fall) left the stevedore's hand, swung across the rail of the ship and down into the hold, striking Mr. Greime, who, as we have said, was working there.

In appellant's description is a constant recurrence of the statement that the falls were too short. This, when referring to the offshore fall, conveys the impression that that cable was shorter than the one for the inshore fall. The suggestion is incorrect. Both falls were the same length. The reason the offshore fall would not reach up the dock as far as the inshore fall was that its boom extended away from the dock while

the inshore boom extended over the dock towards the place where the lumber was. The expression could not apply to the inshore fall because it actually reached the lumber. It is merely a use of words but we think the fairer description is to say that the lumber was placed too far away from the ship for the falls to be used together.

Again, appellant says that when one drum was being used separately, the idle one would frequently revolve. The testimony of winchman Frank, upon which appellant rests his point, is as follows (Ap. 68-69, cross-examination):

> "Q. When the shaft turns the drum is liable to revolve, isn't it?
>
> A. *Not an empty drum*—well, the drum what is engaged, what is thrown into friction, will revolve.
>
> * * * * * * *
>
> Q. Supposing the shaft is revolving and you throw one drum on the friction and you leave the other loose, won't the friction of the shaft cause the loose drum to turn?
>
> A. *If it is a good winch, it never will.*
>
> Q. Sometimes they turn a little, don't they?
>
> A. Sometimes they do.
>
> Q. Even where they are not thrown up on the friction they will?
>
> A. Yes; I have seen many frictions, friction winches doing that."

It is obvious from this testimony that it is only in the case of a winch out of order that the idle drum will revolve when not engaged with its friction. The positive statement of the witness was that "If it is a good winch it never will." This is supported by common sense. The drum floats idly upon an oiled shaft. It is

inconceivable that, in proper working order, it could exert any substantial pull against the weight of the 125 odd feet of 5/8" wire cable hanging down from the head of the boom. This also against the friction of the blocks through which the fall runs.

Appellant says that claimant's answer admits the winches were constructed to be operated with the ends of the falls connected to each other (App. Brief, 3). The point may not be material, but we think such loose statements misleading. The allegation of the libel is

> "The said steam winch was designed and constructed to be so operated." (Ap. 6.)

The answer alleges:

> "Admits that said steam winch was designed and constructed to be substantially operated as in said paragraph alleged, but denies that it was designed or constructed to be operated only in said described manner." (Ap. 15.)

If this be the unqualified admission appellant suggests, it can only lend support to the view that the shipowners had no intention of using the ship's equipment in the manner in which it was used, and as we will later point out, are not responsible for the use in a manner other than that for which furnished.

Points and Authorities.

> "Except for failure to render proper medical treatment, neither a vessel nor her owner is liable to an indemnity for injuries received by a seaman, unless they were caused by the unseaworthiness of a ship or a failure to supply and keep in order the proper appliances appurtenant."

Such is the unquestioned rule of liability and the doctrine of

Chelentis v. Luckenbach S. S. Co., 247 U. S. 372,

as announced by this court in the recent case of

The Frank D. Stout, 276 Fed. 382.

That proper medical treatment was afforded is conceded. It only remains to determine the shipowner's status under the two remaining elements of the rule.

I. THERE WAS NO UNSEAWORTHINESS NOR FAILURE TO SUPPLY AND KEEP IN ORDER THE PROPER APPLIANCES APPURTENANT.

(a) The authorities.

The owners of a vessel are not, as to a seaman, insurers of her seaworthiness. Their duty is to use reasonable care.

Referring to this obligation in

Schirm v. Dene Steam Shipping Co., 222 Fed. 587, *589,*

the court said:

> "it is expressed in terms of reasonable care, the care that a reasonably prudent person would take under the circumstances."

See also,

The C. S. Holmes, 220 Fed. 273 (9th C. C. A.);
Burton v. Greig, 265 Fed. 418.

Unless palpably unreasonable or clearly dangerous, custom among shipowners is the measure for determining what is reasonable care

Boston Marine Ins. Co. v. Metropolitan Redwood L. Co., 197 Fed. 703, *711* (9th C. C. A.):

"The question of the unseaworthiness of a vessel on account of her equipment is largely determined by custom and usage"

The Lizzie Frank, 31 Fed. 477, *478:*

"The owner of this vessel was required to use and exercise in its construction and equipment the usual and customary means and care adopted by reasonably prudent persons in the construction and equipment of vessels of like character."

The Rheola, 19 Fed. 926, *927:*

"Due care or ordinary care implies the use of such vigilance as is proportional to the danger to be avoided, judged by the standard of common prudence and experience."

Hunt v. Hurd, 98 Fed. 683, *686* (7th C. C. A.):

"Because the business might be done in some other and slower way, less dangerous, it does not follow that the method employed involves negligence. The real question is whether the method is the one in general use by other railroad companies, and is reasonably safe. If it is, then it is not negligence of itself, and without regard to circumstances, to employ that method."

Canadian Northern Ry. Co. v. Walker, 172 Fed. 346, *352:*

"when a railroad company, as in this case, has selected and adopted a customary method of loading and unloading its cars and of removing temporary obstructions necessarily used in that work, which is neither palpably unreasonable nor clearly dangerous, it owes its servants no duty to adopt a different method, and it cannot be held guilty of negligence because it has not done so."

The shipowner is not bound to furnish the best and safest appliances.

> *In re Tonawanda Iron & Steel Co.,* 234 Fed. 198, *200:*
>
> "Tow chocks of the kind on the Oceanica were common in ships of her class and construction, and indeed towing chocks allowing good play of line were regarded as convenient and proper appliances; but, even if such were not the case, no negligence for failure to provide more modern appliances is attributable to the vessel, as it has often been decided that owners are not obliged to provide the best, safest and most convenient appliances."

See also,

> *The Santa Clara,* 206 Fed. 179;
>
> *Saversnick v. Schwarzchild & Salzberger,* 125 S. W. 1192;
>
> *Great Western Sugar Co. v. Pray,* 158 Fed. 756.

(b) The "Daisy's" falls were long enough, without being disconnected, to reach any loads placed within the customary distance.

Without conflict, the evidence is that ship's falls are usually about three times the length of the boom (Ap. 47, 51). And this is not an arbitrary length fixed without reason, as appellant would have the court believe. Experience has proved that that amount of cable allows for the run up the boom and a balance for reaching into the various corners of the hold and up the dock for the ordinary purposes of the vessel (Ap. 47, 62).

In view of this rule the shipowners provide in their charters that cargo shall be delivered within reach of ship's tackle and in the particular vessel may specify

the distance. This was what was done with the "Daisy." Her booms, according to Mr. Freeman, were 56 ft. long, her falls 180 ft., cargo was to be delivered within 60 ft. of her side and within this distance she could take it easily without disconnecting the falls (Ap. 56, 57, 58).

Appellant protests that Mr. Freeman's testimony that the falls of the "Daisy" were 180 feet long is not legal evidence because he had not actually measured the falls. But the record is replete with testimony that the falls of steam schooners are customarily three times the length of the boom; the length of the boom on the "Daisy" was 55 feet (as her master testified Ap. 93); and the winchdriver testified that the reach of the "Daisy's" falls was not any different than that on any other vessel he had been on. (Ap. 78) Certainly appellant, as libelant below, did not show the falls to be shorter than customary and usual and if he claimed unseaworthiness or defect of equipment in this behalf, it was his business (his burden of proof) to make the showing. He did not make it.

Be that as it may, however, the lumber which was being taken aboard at the time of the accident was more than 60 feet distant from the vessel's side.

Appellant, making a contention that the distance was only thirty to fifty feet, misrepresents the testimony of Frank, the winchman, by quoting a mere fraction of it. The entire testimony on this subject was as follows (all on cross-examination by proctor for appellant):

> "Q. How far was the pile or the lumber that you were hauling over to the edge of the wharf, away from the edge of the wharf, about how far?
>
> A. About—well, I don't remember exactly. It all depends on the length of the lumber. If it was

about 30 ft., 30 ft. in one of the piles or in several of the piles, they ought to be at least 150 feet away from the ship." (Ap. 72, 73.)

After this quotation and answer the examining proctor turned to other matters and then came back to the question of the distance of the lumber from the ship as follows, obviously putting into the witness's mouth as distance of the lumber from the ship, the figures which the witness previously used as lengths of lumber to calculate that distance (Ap. 74):

"Q. At any rate, you were only pulling the stuff, the lumber or piles whatever it was, you were moving, from 30 or 50 feet away from the edge of the wharf, and pulling them over to the edge?
A. Yes.
Q. How many feet do you think it was?
A. That is another question I cannot——it might have been but from 75 up to 100 to 150 ft. away.
Q. Away from the edge of the wharf?
A. Yes."

Appellant's brief quotes only the following question and answer culled from the foregoing and consisting of a leading question, framed by a misrepresentation of what the witness had previously said in that it propounds as *distance from the ship* what the witness had given as *length of timbers.*

"Q. At any rate, you were only pulling the stuff, the lumber or piles, whatever it was you were moving, from thirty to fifty feet away from the edge of the wharf, and pulling them over the edge?
A. Yes." (Appellant's Brief, p. 22.)

The court will note how the witness corrected the foregoing immediately he appreciated that he was being misled. "That is another question" etc. he said when he

realized he was being interrogated as to the distance of the lumber from the ship which he says was from 75 up to 100 to 150 feet.

Appellant's counsel refers to this as doubts on redirect examination (App. Brief, p. 22). This was not redirect but continued cross-examination.

We know the court will not countenance this kind of misleading presentation of testimony. The falls were ample for taking lumber within 60 ft. of the ship's side and the reason the mate disconnected them was not that they were too short, but that the mill company placed a portion of the cargo too far away—further away than the charter called for and beyond the point where the shipowners intended the falls should work. The vessel was not a new one. She had always been able to handle cargo within the 60 ft. distance before (Mr. Freeman, Ap. 57, 58). And if on the previous voyages made by appellant the falls were not disconnected as he would have us understand (Mr. Grieme, Ap. 36), he must admit them to have been sufficient for lumber delivered within the customary distance.

But even granting for the sake of argument that the falls were not long enough to take aboard the ordinary cargo without being disconnected in the later stages of the work, nevertheless,

(c) In any event the provision of falls which might have to be disconnected to reach loads was not a provision of defective or unfit appliances. A system of disconnecting falls is safe if properly operated.

Appellant's argument, as we understand it, is that the falls, separated, could not be used safely and the ship-

owners, knowing, that to reach the lumber away from the edge of the dock, they would have to be so used, were negligent in not providing longer falls.

Assuming for the purposes herein, that the lumber was placed within the customary distance—and there is, as we have shown, no evidence that such was the case—the use of the falls, disconnected, was perfectly safe, if properly done.

First: Appellant says such use was unsafe because even with the offshore drum away from its friction, the traction of the moving shaft on the drum would cause it to revolve. This is contrary to the evidence and also to sound reason. The winchman said,

> "If it is a good winch, it never will." (Ap. 68, 69.)

Appellant's own witness, Larson (Ap. 46), said that to make the idle drum revolve there would have to be

> "a little grease in the friction there, or little dirt, or if they had been heaving a heavy load, it naturally forms in that wood a sort of a groove in there; the drum then is liable to stick, when they throw up on the lever, that drum might not be thrown off its friction, without the winchdriver knowing it, and some times he, not knowing it, it will turn over".

Sometimes, he says,

> "I have seen it jam so hard that you will have to take a block of wood and knock the drum out, to leave her release; that happens frequently".

It is evident that the occurrences which he was describing were when the winch was not in good working condition and when the drum was not free of its fric-

tion. Here the testimony shows the winch in good working order (Ap. 77). According to Mr. Larson the conditions described are the only ones under which the idle drum will revolve. If he had meant otherwise, he would have said so. It follows that the drum free and but riding on the shaft, would not turn and without turning, the hook could not be pulled out of the stevedore's hand.

Assuming that the turning of the shaft would give a slight pull on the fall, there could not possibly be sufficient traction to operate against the weight of the fall (p. 6, supra), and at most the pull would not be so great that the stevedore could not hold the hook.

Second: If there was sufficient traction for the idle drum to revolve and pull the hook out of the stevedore's hand, another method of securing the hook should have been used. The other means described were, the use of a rope strap on a pile or on a pile of lumber, or the use of a spike. Thus on cross-examination by proctor for appellant, Captain Evanson testified:

> "Q. Now, what would there be to stop him" (the stevedore put to hold the hook and a fellow servant of appellant) "from driving an eyebolt, or something else in the wharf, to hook onto that?
>
> A. Nothing in the world to stop him." (Ap. p. 52.)

And again (at page 54 of the Apostles) the same witness testified answering questioning begun by the court and continued by counsel:

> "Q. What would be the objection to having one of these with hooks instead of having a sailor hold it?

A. I don't know. Sometimes I have seen both. Sometimes we have got a man there, and other times we have not a man there.

Q. They do not have a man there, and they hook it on? A. Yes.

Mr. MACKEY. Q. When they do hook it on something, what do they use?

A. A spike or ring bolt, or anything you want to, and tie your strap in on some lumber pile; there are several things that can be done.

Q. That is up to the captain? A. Yes.

Q. It would be perfectly safe if he had a strap hooked on there, would it? A. Yes."

If the method actually used (of having a stevedore hold the hook) was improper, it was negligence for which the shipowner is not answerable.

The Frank D. Stout, supra.

Third: The foregoing is conclusive that unless the drum was engaged with its friction, the hook could not have been pulled out of the stevedore's hand or if this were apt to take place, other means were available to obviate the risk. But appellant suggests that the pull on the fall was or might have been due to the sticking of the drum on the friction without the winchman's knowledge. Under some circumstances this might be so, but even then it would be the result of the winchman's negligence. It was a part of his work as the operator of the machine to see that the drum was free when necessary. As the facts are, however, the drum could not possibly have remained bound to its friction. If contact was made it must have been due to the intentional or inadvertent operation of the winch levers. Thus: On the last load lowered into the hold, both

drums must have been free from friction as the load went down. The drums were unwinding. When the empty hook was pulled back out of the hold, both drums must have been engaged in friction;—the drums were winding up their falls. But to allow the hook to pass over the dock to the point where the falls were disconnected, the offshore drum would have to "pay out" its cable, while the inshore drum wound its cable up. For the inshore drum to do its part, it must have turned with the friction, as in lifting a load, but to "pay out" as the inshore drum was required to do, it would have to revolve in the opposite direction. That the hook was drawn out to the dock is conclusive as to freedom of the offshore drum from its friction. Hence, whether the drums might on some occasions stick in friction is beside the point and immaterial.

II. THE REARRANGEMENT OF THE SHIP'S EQUIPMENT WAS, IF WRONGFUL, A MISUSE OF APPLIANCES FURNISHED AND NOT A FAILURE TO KEEP IN ORDER THE PROPER APPLIANCES.

Appellant seeks to hold the shipowners responsible for the alleged misuse of the ship's equipment under their obligation to "keep in order the proper appliances appurtenant". In anxiety and confusion he says "Someone on that vessel represented the owner". He fails to appreciate the significance of the terms "delegable" and "non-delegable" duties. With respect to the obligation to supply and keep in order the proper appliances, he is right when he says "someone on that

vessel represented the owner''. That obligation is non-delegable. But in the *operation* of the appliances, no one represented the owners in a way to make them or their ship answerable. The late section 20 of the Seaman's Act upon which appellant still seems to pin some faith, furnishes no argument. It is simply ''irrelevant''.

Chelentis v. Luckenbach S. S. Co., supra.

It may be that if the detaching of the falls were an act in the performance of a non-delegable duty and it were found negligent and wrongful, the shipowner would be liable. This irrespective of section 20 of the Seaman's Act. The statute makes it no stronger. But, to appellant's misfortune, if it were negligence, it was in the performance of one of those duties which are said to be delegable and for which the shipowner is not answerable. It makes no difference who did it, master, mate or seaman. It was an act of operation. It was a detail in the use of appliances which the shipowner is permitted to leave to his crew. The principle is the same as that recently enunciated by this court in

The Frank D. Stout, supra,

decided last October.

> ''If it was careless not to use a trip line, such carelessness is attributable to the officers of the ship, but not to the owners, who supplied ropes.''

There it was non-use of appliances furnished. Here, if wrongful, a misuse of them.

So also, in

John A. Roebling's Sons Co. v. Erickson, 261 Fed. 986, *987, 988* (certiorari denied, 40 Sup. Ct. 394; 64 L. Ed. 480):

"So far as the unusual and dangerous method of discharging the cargo is concerned that was an improvident order of the master, for which the owners are not liable (Chelentis v. Luckenbach S. S. Co., supra);

* * * * * * *

There would, however, be little security for careful owners if, after furnishing a seaworthy ship and proper appliances, they were still liable for the act of the master in not using the proper appliances furnished, or in using them for purposes for which they were not furnished."

See, also,

The Persian Monarch, 55 Fed. 333 (2nd C. C. A.);

26 Cyc. 1120;

American Bridge Co. v. Seeds, 144 Fed. 605 (8th C. C. A.).

The phrase "keep in order" means no more than that reasonable care must be exercised to keep the ship seaworthy. It refers to structural defects or weakness, the result of wear and tear in use. Due care must be used to see that cables, ropes, spars, appliances and rigging are of suitable materials, quality and kind, and to see that they are kept in that condition, but the phrase does not mean that the shipowner must see that the parts are used properly nor that when the movable equipment is to be adjusted for work that he must see that it is placed properly. For non-use or misuse by the crew the shipowner is not answerable and if there

was any wrong in the way the "Daisy's" appliances were used, it was "misuse" within this rule. Proper appliances were supplied. Nothing was defective or worn out.

III. THE STEVEDORE ON THE DOCK WAS LIBELANT'S FELLOW-SERVANT.

All engaged in loading the "Daisy" at the time of the accident were in the employ of the ship and under the sole direction and supervision of the mate (Ap. 89).

If therefore appellant's injuries were due to negligence of the *stevedore* (as distinguished from that of an officer and member of the crew of the vessel) who was supposed to hold on to the hook, it was negligence of a fellow-servant for which the shipowners are not answerable.

Herman v. Port Blakely Mill Co., 71 Fed. 853;
Harrell v. Atlas Portland Cement Co., 250 Fed. 83;
The Hoquiam, 253 Fed. 627 (9th C. C. A.);
Western Fuel Co. v. Garcia, 260 Fed. 839 (9th C. C. A.).

IV. APPELLANT ASSUMED THE RISK OF AN ACCIDENT SUCH AS OCCURRED.

The general doctrine of assumption of risk is well stated in

Bethlehem Iron Co. v. Weiss, 100 Fed. 45, *49:*

"a servant, upon entering the service of his master, assumes all the ordinary risks incident to

> the service, so far as those risks at the time of entering upon the service are known to him, or should be readily discernible to a person of his age and capacity, in the exercise of ordinary care, and whether the business is dangerous or not."

This doctrine, as regards to the ordinary risks incident to the employment is applicable to seamen.

> *The Iroquois,* 194 U. S. 240; 48 L. Ed. 955:
>
> "A seafaring life is a dangerous one, accidents of this kind are peculiarly liable to occur, and the general principle of law that a person entering a dangerous employment is regarded as assuming the ordinary risks of such employment is peculiarly applicable to the case of a seaman."

In this situation, if it be admitted for the sake of argument, that because of the prevailing custom on this coast, the method in loading the "Daisy" was one adopted by the shipowner, *that same custom makes the risks incident to the method employed, one of the usual risks of the employment which were assumed by the appellant.* He cannot blow hot and cold, and with the same breath that he puts knowledge of the custom on the shipowners, escape the imputation to himself. In fact, his opportunity for knowing the custom was greater than that of the shipowners because he was always present during the progress of the work, while it is unlikely that the shipowners were present.

In this respect the following cases seem to us conclusive:

> *Red River Line v. Cheatham,* 60 Fed. 517, 521 (5th C. C. A.):
>
> "The general usage in the business being proved, and being known to all steamboat hands and em-

ployes, it follows that the risk attendant upon such method of landing steamboats is incidental to the employment, and assumed by the employe."

(N. B.: Employe was a deck hand.)

The Saratoga, 94 Fed. 221, *223* (2nd C. C. A.):

"but so far as the crew, and the regular gangs of workmen from shore, who are familiar with the location and regulation of the hatches, are concerned, their knowledge of the situation and their continuance at work are held to be conclusive evidence that, as to the particular danger of which they were thus advised, they took their risk."

In the same case in the District Court, 87 Fed. 349, 359, it is said:

"It must be concluded that the libelant assumed the risk of danger arising from the known fact that it was the custom to leave hatches uncovered."

Hunt v. Kile, 98 Fed. 49, *53:*

"If, as claimed, Davis was an experienced man, and accustomed to such work, it cannot be asserted that he was ignorant of the danger resulting from the omission to supply or employ them. Under such circumstances, he entered upon the particular work knowing that chocks were not furnished, and with full knowledge of the danger which might result from their absence. He therefore assumed the risk, and the master cannot be held responsible for failure of duty in this respect."

Hughes v. The W. & St. P. R. Co., 6 N. W. 553 (Minn.):

"But if a man enters and continues in a service with knowledge of the manner in which the business is conducted, without objection to his employer, or any promise on the part of his employer to change the mode of doing business, he does it with

his eyes open, assumes the risks, and cannot recover damages, even although this mode of conducting business be careless."

Benedict v. Chicago Great Western Ry. Co., 78 S. W. 60, *61:*

"An act which is performed in the usual manner in practice for the doing of such acts is presumed in law to be reasonably safe, and a servant injured while in the service of the master on such occasions is held to have assumed the risk, and the master is not liable to the servant for his damages."

See also,

The Scandinavia, 156 Fed. 403;

Herman v. Port Blakely Mill Co., 71 Fed. 853.

The Colusa and *The Fullerton* have been cited as authority for a doctrine contrary to that announced above. They and others that might be mentioned are distinguishable, however, in that they involve the assumption of the *risk of a defective appliance*, and not of a *customary method.* The risk of a defect in an appliance is necessarily isolated, and never one of the usual or customary risks of an occupation. In the present case, if the knowledge imputed by custom is to prevail, libelant knew or should have known when he shipped on the "Daisy" that he would be subjected to the risks incident to the method used.

V. THE BURDEN OF PROVING UNSEAWORTHINESS IS ON APPELLANT AND THIS HAS NOT BEEN MET.

"The fact of accident carries with it no presumption of negligence on the part of the employer; and

> it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence",

said the United States Supreme Court in

Patton v. Texas and P. R. Co., 179 U. S. 658,

and continuing, it said:

> "it is not sufficient for the employee to show that the employer *may* have been guilty of negligence; the evidence must point to the fact that he *was.*
>
> And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion." (Italics ours.)

Examining the evidence it is obvious that *the proof does not show,*

(a) That the falls were too short. It merely shows that in the particular instance the lumber was placed too far away.

(b) That the idle drum of the winch would revolve even when not engaged in friction. It merely shows that it might revolve if the winch be out of order. There is no evidence that this winch was *out* of order. On the contrary there is evidence that it was *in* order.

(c) That the idle drum, disengaged from friction, did in fact, revolve at the time of the accident.

(d) Or even that the accident was proximately due to the arrangement of the equipment. According to the

evidence, the accident might have been caused by any one of the following: Inadvertent pulling of the wrong lever by the winchman, pure carelessness of the stevedore in not maintaining a firm grip on the hook or—granting appellant's contention—to a turning of the drum on the shaft. But at best it might have been due to one as much as the other. That the drum stuck to the friction must be eliminated, because as we have shown, it must have been turning opposite to the cog-wheel, when it was pulled out on the dock (p. 16, supra).

VI. ALL WITNESSES EXCEPT TWO OF CLAIMANTS WERE HEARD IN OPEN COURT AND THE FINDINGS OF FACT MADE BY THE TRIAL COURT SHOULD NOT BE DISTURBED ON APPEAL.

It is true that there is no conflict in the evidence as to the manner in which the accident occurred but whether or not the vessel was seaworthy and properly equipped and what the appliances would do under various arrangements, was contested. That, under such circumstances where the trial court has heard practically all the testimony, its findings will not be disturbed, except for manifest error, is, of course, settled in this circuit as elsewhere.

The Hardy, 229 Fed. 985;

The Beaver, 253 Fed. 312.

The lower court's findings were:

> "The injury to libelant, however much it is to be regretted, was not caused by any faulty equipment, but by the careless use of the equipment with which the vessel was supplied."

VII. APPELLANT'S AUTHORITIES ARE NOT IN POINT.

The citations in appellant's brief on the duty of the shipowner "to keep in order" the proper appliances all have to do with structural defects, not method of use or arrangement. Thus:

Burton v. Greig, 265 Fed. 418,

involved an alleged defective steam pipe.

In

Berg v. Philadelphia & R. Co., 266 Fed. 591,

there was an improper or defective eyebolt.

In

The Dredge No. 15, 264 Fed. 135,

there was a defective (leaky) boiler.

In

Cricket S. S. Co., 263 Fed. 523,

an improperly constructed winch fall was supplied and no others were available.

On the question of assumption of risk, as previously said appellant's authorities are easily distinguishable from the case in hand. In both *The Colusa* and *The Fullerton,* the seaman injured was at sea with no alternative but to work with the appliances at hand. Here

the vessel was in port and appellant could have quit the ship. Moreover, in the cases referred to, the appliances were defective. Here, if the use was wrongful, it was a method of work with which appellant was much more familiar than the shipowners. If he did not approve, it was his privilege to enter other employment.

So also as to the authorities on custom and usage as determining the measure of care required of an employer.

In

Wabash R. R. Co. v. McDaniels, 107 U. S. 454, the court was concerned with the contention that compliance with ordinary practice conclusively established the use of reasonable care. This is not what we urge. Our assertion is that in the absence of a showing that common usage is palpably unreasonable or manifestly dangerous, reasonable care has been exercised when the methods and equipment generally used by others in a similar business have been employed. This disposes of appellant's other citations on this point.

For the foregoing reasons we submit that the decision of the lower court should be affirmed with costs in favor of appellee.

Dated, San Francisco,
February 24, 1922.

Respectfully submitted,

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